IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.03.2007

CORAM

THE HONOURABLE MR. JUSTICE P.JYOTHIMANI

Appeal Suit No. 1064 of 1993

1.V.S.Somasundaram
2.Minor Karthik
represented by father and
guardian V.S.Somasundaram first Appellant .. Appellants(Defendants)

Versus

S.Pandarinathan .. Respondent(Plaintiff)

Prayer: This appeal suit is preferred under Section 96 of CPC against the Judgment and decree passed in O.S.No.8 of 1989 dated 10.03.92 on the file of the Subordinate Judge, Gobichettipalayam.

For Appellants :Mr.M.Duraisamy for
Mr.T.Muragamanickam
For Respondent :M/s.M.M.Sundresh

JUDGMENT

The defendants in the suit have filed the present first appeal. The respondent filed a suit against the defendants for recovery of money due under a promissory note executed by the first defendant on 17.10.1986 for a sum of Rs.36,007/- and agreeing to repay the same with 12% interest. The plaintiff has issued a notice to the first defendant on 25.11.88 and there was no reply from the defendants.

2.The plaintiff has filed the suit for recovery of money under the promissory note on the basis that the borrowal by the first defendant from the plaintiff is for joint family benefits and the first defendant being the father and second defendant being the minor son of the first defendant living jointly both the defendants are liable.

3.The first defendant filed written statement denying the execution of promissory note. That apart, it was the case of the first defendant, that he had no money dealings with the plaintiff at any point of time. The first defendant was carrying on business with one V.K.Gobia Gounder in a partnership firm in which, the first defendant has contributed a

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cash of Rs.15,000/- as his share and in respect of the remaining amount of Rs.5,000/- he has executed blank promissory note and handed over the same to the said V.K.Gobia Gounder. Thereafter, there was some strained relationship between the first defendant and the said V.K.Gobia Gounder, who was the Managing partner of the partnership firm namely Vellankoil Sri Lakshmi Finance. When the first defendant requested the said V.K.Gobia Gounder to return the promissory note. Due to the strain relationship, the said V.K.Gobia Gounder has set up the plaintiff who is the co-brother of the said V.K.Gobia Gounder to file the suit on the blank promissory note given by the first defendant to the said V.K.Gobia Gounder.

4.In the trial Court the plaintiff has examined himself as PW1 and apart from him, two witnesses PW2 and PW3 were examined who were the scribe and attesting witness of Ex.A1 promissory note. On the side of the defendants, the first defendant himself was examined as DW1 and other witness was examined as DW2 who is stated to be a relative of the said V.K.Gobia Gounder.

5.The trial Court has framed the following issues;

1.Whether the first defendant has executed the suit promissory note for a sum of Rs.30,000/-?

2.Whether the suit promissory note was created fraudulently as stated in the written statement?

3.Whether the second defendant is a necessary party?

4.Whether the plaintiff is entitled to the relief from the defendant as prayed in the plaint?

6. The trial Court on appreciation of evidence having come to a conclusion that the execution of promissory note has been proved and having held that the second defendant is also living with the first defendant and therefore, the first defendant can be stated to be the kartha of the family and therefore the borrowal was treated for the benefit of the family and also on the basis that the second defendant is living with the first defendant, held he is also responsible for the liabilities of the first defendant on the basis of pious obligation theory.

7.It is as against the judgment and decree of the trial Court the defendants have filed the present first appeal.

8.The point for consideration in this appeal is as to whether the judgment and decree of the trial Court is valid and the defendants are jointly liable to pay under the suit promissory note?

9.The contention of the learned counsel for the appellants, is that in order to prove the defence raised by the defendants that the suit promissory note was not executed in favour of the plaintiff and on the

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other hand a blank promissory note was given to one V.K.Gobia Gounder in relation to the partnership business run in the name of Vellankoil Sri Lakshmi Finance, the first defendant has examined apart from himself as DW1, another independent witness DW2 who is admittedly a relative of the said V.K.Gobia Gounder. It is seen, as per the evidence of DW2 that after the suit notice was received from the plaintiff, the first defendant has approached the plaintiff along with DW2 who in his turn has directed the first defendant to approach the said V.K.Gobia Gounder and on the basis of the said direction, the first defendant has met the V.K.Gobia Gounder along with DW2, in respect of partnership account which proves that the promissory note was not given to the plaintiff. As per the learned counsel for the appellants, the first defendant has taken steps to prove that the execution of the promissory note was not for consideration received from the plaintiff.

10.The learned counsel for the appellants would submit that when once it is found by the trial Court categorically that the first defendant has borrowed and when he is alive, on the basis that the first defendant is treated as the Kartha and therefore the second defendant being the minor son of the first defendant, is responsible for the liabilities of the first defendant under the pious obligation theory is untenable, especially in the circumstances that even assuming that there is a joint family, during the life time of the first defendant, the question of pious obligation against the second defendant does not raise.

11.The learned counsel for the respondent would submit that while it is true that the defendants have examined another witness who is the relative of the said V.K.Gobia Gounder as DW2, and in his deposition he has submitted something about the obligation of the first defendant to pay the balance amount in the partnership firm run between the first defendant and the said V.K.Gobia Gounder, it remains the fact that there is nothing on evidence to show that the first defendant has taken any steps for returning the promissory note from the said V.K.Gobia Gounder except examining the DW2. Therefore, according to the learned counsel for the respondent, the onus in respect of the borrowal by the first defendant has been proved as per the provision of the Negotiable Instrument Act.

12.On the other hand, the learned counsel for the respondent fairly submits that the pious obligation theory as far as the order of the trial Court relating to the second defendant will not arise during the life time of the first defendant.

13.The judgment of the trial Court clearly shows that the trial Court has infact considered the evidence of PW2 and PW3 who were examined for the purpose of proving Ex.A1 promissory note dated 17.10.86. In fact PW.2 who was the scribe of Ex.A1 the promissory note has clearly stated that it was he who prepared the said promissory note

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and on the other hand PW3 who is the witness of Ex.A1 in a categoric terms has stated that on the date when the pro-note was executed, the amount was paid to the first defendant. The trial Court has discussed the evidence of PW2 and PW3 extensively and I am of the considered view that it does not warrant any interference since the finding of the fact by the Court below in respect of the execution of the promissory note is with an unimpeachable credibility.

14.The next contention raised by the learned counsel for the appellants is that by examining D.W.2 who is the relative of the said V.K.Gobia Gounder, the first defendant has proved that there has been earlier partnership between the first defendant and the said V.K.Gobia Gounder under which the first defendant has issued the blank promissory note in favour of the said V.K.Gobia Gounder and it must be taken that the first defendant has proved that the pronote was not executed in favour of the plaintiff for any consideration received from him. A reference to the evidence of DW2 shows that DW2 has gone along with the first defendant to meet V.K.Gobia Gounder and he has also stated that in respect of the contribution of money by the partnership firm namely Vellankoil Sri Lakshmi Finance, the first defendant had some deficiencies and when the first defendant and DW2 had met V.K.Gobia Gounder, he assured that steps will be taken for the purpose of settlement of accounts. That apart it is not the case of the first defendant that apart from meeting the said V.K.Gobia Gounder along with DW2 for the purpose of settlement of accounts, it remains the fact that the first defendant has not taken any steps for the purpose of getting return of the blank promissory note stated to have been executed by him in favour of the said V.K.Gobia Gounder. In the absence of such action taken by the first defendant, merely examination of DW2 as witness is not sufficient to prove that the first defendant has taken steps to disprove the execution of Ex.A1, as correctly found by the trial Court. In view of the above said factual position, there is nothing warranting to interfere with the judgment of the trial Court in so far as it relates to the first defendant. As far as the liability imposed on the second defendant as minor son of the first defendant under pious obligation theory, the same is not sustainable in law especially in the circumstance when the trial court has found in categoric terms that the borrowel of the first defendant from the plaintiff was not for the joint family business, on the assertion that the first defendant can never be treated as the kartha when it was found that the first defendant's father is alive and living with him. In any event as long as the first defendant is alive, the question of imposing responsibility on the minor son, the second defendant, under pious obligation theory does not arise as rightly submitted by the learned counsel for the respondent also. A reference to Ex.A1 also shows that the borrowal by the first defendant is in his individual capacity and not on behalf of the family as rightly pointed out by the trial Court. In view of the above said facts and circumstances, the second defendant can never be held liable under Ex.A1 on the basis of pious obligation theory. Therefore, the judgment and

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decree of the trial Court are confirmed except setting aside the portion of the judgment and decree against the second defendant. The appeal stands dismissed in the above terms with cost against the first defendant. Consequently, connected C.M.P.No.3792 of 1993 is closed.

jikr

Sd/
Asst. Registrar

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Sub Asst.Registrar

To

1. The Subordinate Judge, Nagapattinam.
2. The Record Keeper, V.R. Section,
High Court, Chennai.
+ One cc to Mr. M.M. Sundresh Advocae sR 19238
+ One cc to Mr. M. Duraisamy Advocate SR 18898
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